AmInvestment Bank Bhd v Nep Holdings (M) Bhd

HIGH COURT (KUALA LUMPUR) — WRIT NO 22NCC-1884–12 OF 2012
AZIZAH NAWAWI JC
29 MAY 2013

Civil Procedure — Summary judgment — Application for — Principles applicable — Whether plaintiff had satisfied preliminary requirements for proceeding under O 14 of the Rules of Court 2012 — Whether there were grounds for dismissal of application

Evidence — Affidavit — Admissibility of — Whether affidavit should only contain facts that deponent was able of his own knowledge to prove — Whether evidence raised in affidavit was hearsay evidence — Exception — Whether exception in respect of affidavits sworn for interlocutory proceedings would apply — Rules of Court 2012 O 41 r 5(1) (2)

The defendant had appointed the plaintiff as its adviser and underwriter for its proposed listing on the main board of Bursa Malaysia Securities Bhd ('Bursa'). The defendant agreed to pay the plaintiff agreed fees of RM600,000 as per the schedule of payment. The plaintiff submitted the listing application to the relevant authorities and obtained an in-principle approval from the Securities Commission ('SC') for the proposed listing subject to certain conditions to be complied with by the defendant. Thereafter, the plaintiff applied for two extensions of time to enable the defendant to complete the proposed listing. The SC rejected the proposed listing because of the financial position of the defendant. The plaintiff claimed the sum of RM361,333 for the services it had rendered until the date of the rejection of the proposed listing. When the defendant failed to pay the said amount, the plaintiff filed a suit to recover the same. This was the plaintiff's application for summary judgment against the defendant pursuant to O 14 of the Rules of Court 2012 ('ROC'). The defendant submitted that the application should be dismissed on two grounds, namely the plaintiff's failure to ensure compliance with the requirement of the SC and because of the oral agreement which varied the schedule of payment of the plaintiff's fees.

Held, allowing the plaintiff's application with costs:

(1) In the present case the plaintiff had satisfied the preliminary requirements for proceeding under O 14 of the ROC. Therefore, the burden had then shifted to the defendant to satisfy the court why judgment should not be entered against it (see para 13).

(2) The SC's rejection of the proposed listing had nothing to do with the failure of the plaintiff to ensure compliance with the conditions imposed by the SC. Instead, the reason given by the SC was the financial position of the defendant (see para 16).

(3) The allegation of an oral agreement, which was said to have varied the terms of the payment of fees, could not be sustained. The defendant's affidavit that was deposed by the defendant's company secretary failed to identify the director of the defendant company that was involved in the discussion with regard to the variation of the schedule of payment of the plaintiff's fees. The affidavit also failed to disclose the source of the company secretary's information with regard to the alleged oral agreement. As such, the evidence raised in the defendant's affidavit, which averred to an alleged oral agreement between two parties other than the deponent of the affidavit, was hearsay evidence and inadmissible. Under O 41 r 5(1) of the ROC, it is clearly provided that an affidavit may contain only such facts as the deponent was able of his own knowledge to prove. Even though O 41 r 5(2) provides for an exception in respect of affidavits sworn for interlocutory proceedings, the present application for summary judgment was not an interlocutory matter but a final matter which would be decisive on the rights of the parties. Thus, the affidavit of the defendant should only contain facts that he was able of his own knowledge to prove (see paras 17–20).

[**Bahasa Malaysia summary**
Defendan telah melantik plaintif sebagai penasihat dan penaja jaminnya bagi cadangan penyenaraiannya di papan utama Bursa Malaysia Securities Bhd ('Bursa'). Defendan bersetuju untuk membayar plaintif fi yang dipersetujui sebanyak RM600,000 seperti jadual bayaran. Plaintif menyerahkan permohonan penyenaraian tersebut kepada pihak berkuasa yang relevan dan memperolehi kelulusan secara prinsip daripada Suruhanjaya Sekuriti ('SS') untuk penyenaraian yang dicadangkan tertakluk kepada syarat-syarat tertentu untuk dipatuhi oleh defendan. Kemudiannya, plaintif memohon untuk dua pelanjutan masa untuk membolehkan defendan menyelesaikan penyenaraian yang dicadangkan. SS menolak penyenaraian yang dicadangkan kerana kedudukan kewangan defendan. Plaintif menuntut sejumlah RM361,333 untuk khidmat yang diberikan sehingga tarikh penolakan penyenaraian yang dicadangkan. Apabila defendan gagal untuk membayar jumlah tersebut, plaintif memfailkan tindakan untuk mendapatkannya. Ini adalah permohonan plaintif untuk penghakiman terus terhadap defendan berikutan A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Defendan berhujah bahawa permohonan patut ditolak atas dua alasan, iaitu kegagalan plaintif untuk memastikan kepatuhan dengan kehendak SC dan oleh kerana perjanjian lisan yang mempelbagaikan jadual bayaran fi plaintif.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Dalam kes ini plaintif telah memenuhi keperluan awal untuk prosiding

di bawah A 14 KKM. Oleh itu, beban kemudiannya telah beralih kepada defendan untuk memuaskan mahkamah mengapa penghakiman tidak patut dimasukkan terhadapnya (lihat perenggan 13).

(2) Penolakan SS terhadap penyenaraian yang dicadangkan tidak adak kena mengena dengan kegagalan plaintif untuk memastikan pematuhan dengan syarat-syarat yang dikenakan oleh SS. Sebaliknya, alasan yang diberikan oleh SS adalah kedudukan kewangan defendan (lihat perenggan 16).

(3) Tuduhan terhadap perjanjian lisan, yang mana dikatakan mempelbagaikan bayaran fi, tidak dapat dikekalkan. Afidavit defendan yang telah diberikan oleh setiausaha syarikat defendan gagal untuk mengenal pasti pengarah syarikat defendan yang terlibat dalam perbincangan berkaitan pelbagaian jadual bayaran fi plaintif. Afidavit juga gagal untuk mengemukakan punca maklumat setiausaha syarikat berkaitan perjanjian lisan yang didakwa. Oleh itu, keterangan yang dibangkitkan di dalam afidavit defendan, yang menegaskan kepada perjanjian lisan yang didakwa antara kedua-dua pihak selain daripada deponen afidavit tersebut, adalah keterangan kata dengar dan tidak boleh diterima. Di bawah A 14 k 5(1) KKM, ia jelas memperuntukkan bahawa afidavit mungkin mengandungi hanya fakta sedemikian kerana deponen boleh dengan pengetahuannya sendiri untuk membuktikannya. Walaupun A 41 k 5(2) memperuntukkan untuk pengecualian berkaitan afidavit yang dimasukkan untuk prosiding interlokutori, permohonan untuk penghakiman terus ini bukan perkara interlokutori tetapi adalah perkara muktamad yang mana menjadi penentu atas hak pihak-pihak. Oleh itu, afidavit defendan hanya patut mengandungi fakta yang hanya boleh dibuktikan dengan pengetahuannya sendiri (lihat perenggan 17–20).]

Notes

For cases on admissibility of affidavit, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 336–346.

For cases on application for summary judgment, see 2(4) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 8443–8501.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ (Rep) 14; [1992] 1 CLJ 627, SC (refd)

Hua Joo Development Co Sdn Bhd v Survey Development Services [1994] MLJU 58, HC (refd)

Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors [1993] 3 MLJ 303, HC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283, FC (folld)

Pacific Inter-Link Sdn Bhd v Pemilik Kapal atau Vesel 'Makatsarija' [1999] MLJU 721; [2000] 2 CLJ 679, HC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 2, O 14 r 5(1), (2)
Rules of the High Court 1980 O 41 r 5(2)
Subordinate Court Rules 1980 O 25 r 26(2)

JF Loo (ML Tan with him) (Gan Partnership) for the plaintiff.
Sivashangari (Bell & Lee) for the defendant.

Azizah Nawawi JC:

THE APPLICATION

[1] Enclosure 9 is the plaintiff's application for summary judgment against the defendant pursuant to O 14 of the Rules of Court 2012.

[2] The plaintiff's claim against the first defendant is for sum of RM361,333 for services rendered as adviser, managing underwriter, underwriter and sole placement agent for the proposed listing ('the proposed listing') of the defendant company on the main board of Bursa Malaysia Securities Bhd ('Bursa Malaysia').

THE SALIENT FACTS

[3] By a letter dated 30 July 2007, the plaintiff had offered and the defendant had accepted the plaintiff's services for the proposed listing of the defendant company on the main board of Bursa Malaysia.

[4] Under cl 3 of the agreement, the fees of the plaintiff to act as the adviser, which the defendant had agreed to pay is RM600,000. Payment of the agreed fees is to be in accordance with the following schedule:

No	Pre - Submission Stage	Total (RM)
1.	Upon appointment	20,000
2.	Upon presentation of proposed listing structure	80,000
3.	Upon presentation of draft submission to the company	80,000
4.	Immediately prior to the submission of application to SC, FIC and MITI	120,000
	Implementation stage	

5.	Upon receipt of approvals from the SC, FIC and MITI	140,000
6.	Upon registration of Prospectus with the SC	80,000
7.	Upon listing of shares on Bursa Securities	80,000
	Total	600,000

[5] On 26 February 2008, the plaintiff has submitted the listing application to the Securities Commission ('the SC'), the foreign investment committee ('the FIC') and the Ministry of International Trade and Industry ('MITI').

[6] By a letter dated 6 March 2008, Bursa Malaysia informed the plaintiff that Bursa Securities has approved in-principle for the admission of the defendant company on the main board of Bursa Malaysia, subject to certain conditions and SC's approval. In a letter dated 23 June 2008, MITI says that it has no objection to the proposed listing, subject to certain conditions and of course, the SC approval.

[7] On 29 September 2008, the SC approved the listing proposal subject to certain conditions to be complied with by the defendant.

[8] In a letter dated 24 November 2008 to Bursa Malaysia (Listing Division), the plaintiff informed Bursa of a Revised Listing Scheme and applied for an extension of time to comply with the *'Shareholding Spread Requirement'*. Bursa granted an extension of six months via a letter dated 1 December 2008. In a letter dated 7 August 2009, the plaintiff applied for further extension to complete the proposed listing.

[9] However, in a letter dated 16 April 2010, the SC rejected the proposed listing on the following reason:

> 2 Dimaklumkan bahawa permohonan tuan di atas *tidak diluluskan berikutan keadaan kewangan NEP kini yang telah merosot dengan begitu ketara* sejak cadangan pengapungan NEP diluluskan oleh kami. Keadaan ini telah menimbulkan keraguan terhadap kesinambungan perniagaan dan daya saing NEP di masa hadapan. (Emphasis added.)

[10] In exh 'P7', the plaintiff issued two debit notes, for RM216,924 (for presentation of draft submission to company, prior submission to SC, FIC and MITI) and for RM144,409 (upon receipt of approvals from SC, FIC and MITI), totalling RM361,333. The defendant has paid RM100,000 which the plaintiff said was for item 1 and 2 of the schedule of payment.

[11] When the defendant failed to pay the said amount in the two debit

notes, the plaintiff filed this suit to recover the same.

THE FINDINGS OF THE COURT

[12] In an application for summary judgment, this court is guided by the principles laid down in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283; [1984] 2 CLJ 220, where it was stated by the Federal Court as follows:

> … We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14, the preliminary requirements:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant;
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
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> … If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him …

[13] In the present case, the plaintiff had satisfied the preliminary requirements as laid down in the *Kayu Raya's* case that is:

(a) the defendant has entered appearance;

(b) the statement of claim have been served on been served on the defendant; and

(c) the affidavit in support is in compliance with O 14 r 2 of the ROC 2012.

Therefore, the burden is then shifted to the defendant to satisfy the court why judgment should not be entered against it.

[14] In *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400; [1992] 1 CLJ (Rep) 14; [1992] 1 CLJ 627 the Supreme Court held that the duty of a judge does not end as soon as the fact is asserted by one party, or denied or disputed by the other on affidavit. The judge has a duty to reject such assertion or denial if such assertion or denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or is inherently improbable. The court will have to identify the issues of fact or law and to determine whether they are triable.

[15] It is the submission of the defendant that the application for summary judgment should be dismissed on two grounds:

(a) that the plaintiff has failed to ensure compliance with the requirement of SC; and

(b) that there was an oral agreement which varied the schedule of payment of the plaintiff's fees.

[16] It is my considered opinion that the first issue is clearly misconceived. From the letter of the SC dated 16 April 2010 rejecting the proposed listing, the reason given by the SC is the financial position of the defendant; it has nothing to do with failure of the plaintiff to ensure compliance with the conditions imposed by SC.

[17] With regards to the issue of the alleged oral agreement to vary the terms of payment, the defendant says that one Sip Way Keong, a director of the plaintiff company had agreed that the balance of the fees will only be paid upon the successful listing of the defendant company on Bursa Malaysia. In para 9 of the affidavit affirmed by Tan Kah Huat, the company secretary of the defendant, the deponent said this:

> Saya juga seterusnya menyatakan bahawa Pengarah plaintiff pada masa dan ketika itu bernama Sip Way Keong telah berjanji kepada Pengarah defendan bahawa defendan hanya perlu membuat bayaran fee baki seperti yang dituntut oleh plaintif selepas plaintif berjaya menyenaraikan defendan secara rasmi di Bursa Malaysia dan defendant dapat hasil penyenaraian (listing proceeds) dari Bursa Malaysia.

[18] From para 9 of the defendant's affidavit, there was no other details on the alleged oral agreement. The defendant did not identify its officer to whom the oral agreement was made. The deponent of the affidavit, Tan Kah Huat is the company secretary, and the alleged oral agreement was made to an unidentified director of the defendant company. Apart from not identifying the director involved, and bearing in mind that it is only an alleged oral agreement, Mr Tan also failed to diclose the source of his information of the alleged oral agreement. He did not state that he spoke to the director concerned, as para 2 disclosed that his information on the facts is from the company documents and advice from his lawyers. As such, as it stands, para 9 of the defendant's affidavit is hearsay evidence and cannot be relied to sustain the allegation of an oral agreement which is said to have varied the terms of the payment of fees.

[19] In *Pacific Inter-Link Sdn Bhd v Pemilik Kapal atau Vesel 'Makatsarija'* [1999] MLJU 721; [2000] 2 CLJ 679, the court held at p 6 (MLJU); p 683/d-e (CLJ):

It cannot be over emphasised here that affidavit may only contain such facts as the deponent is able of his own knowledge to prove. Order 41 r 5(2) of the RHC provides for an exeption where affidavits sworn for interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. Statements of information or belief have no probative value unless the sources and grounds of the information and belief are revealed, see *Dynacast (S) Pte Ltd v Lim Meng Siang & Ors* [1989] 2 CLJ; [1989] 3 MLJ 456. Failure to identify the sources, the relevant paragraphs of the affidavits become inadmissible as evidence as they are purely hearsay. (Emphasis added.)

[20] Under O 41 r 5(1) of the ROC 2012, it is clearly provided that an affidavit may contain only such facts as the deponents is able of his own knowledge to prove. Even though O 41 r 5(2) provides for an exeption where affidavits sworn for interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof, an application for summary judgment is not an interlocutory matter but is a final matter which will be decisive on the rights of the parties. In *Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303, Zakaria Yatim J held at p 309/C-D;

In *Rossage v Rossage*, the English Court of Appeal decided *that where the proceedings were not interlocutory proceedings, hearsay evidence was inadmissible and irrelevant In the present case, the proceedings are not interlocutory but a final matter and hearsay evidence is therefore inadmissible.* (Emphasis added.)

[21] In *Hua Joo Development Co Sdn Bhd v Survey Development Services* [1994] MLJU 58, the issue before Justice Chong Siew Fai is the interpretation of O 25 r 26(2) Subordinate Court Rules, 1980, which is identical to O 41 r 5(2) of the Rules of the High Court 1980(RHC). His Lordship held:

Whether an application is interlocutory or final depends on the circumstances in which it is made and the order, if any, which the application seeks. … But an application such as the one in our instant case, *the purpose of which is to obtain an order which, if granted, is to strike out a pleading and to enter final judgment in the action is, in my opinion, not an interlocutory proceeding for the purpose of O 25 r 26(2). An order under such an application would finally determine the rights of the parties in the action. Affidavits made in support of such an application, therefore, should, in my view, contain facts that the deponent is able of his own knowledge to prove.*

(Emphasis added.)

[22] Therefore since this application is not an interlocutory application, as the purpose is to enter a final and conclusive summary judgment against the defendant, then the affidavit of the defendant should only contain facts that he is able of his own knowledge to prove. In this case, since the defendant averred

to an alleged agreement between two other parties, of which he was not involved, then the statement on the alleged consent agreement is hearsay evidence and is inadmissible.

[23] Having considered the circumstances of this case and the submission of parties, I am of the considered opinion that there is no triable issue raised by the defendants. In the premise, I had allowed encl 9 with costs.

Plaintiff's application allowed with costs.

Reported by Kohila Nesan